BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

VERONICA INOJOSA, Claimant, v. EARL and DAN WISE, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	)	**IC 01-505496** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED OCT 22 2004

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Twin Falls, Idaho, on April 22, 2004. Mark R. Wasden represented Claimant. Neil D. McFeeley represented Defendants. The parties took posthearing depositions and submitted briefs. The case came under advisement on August 5, 2004, and is now ready for decision.

ISSUES

After due notice to the parties, the issues were identified as:

1. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident;

2. Whether and to what extent Claimant is entitled to the following benefits:

   (a) temporary partial or temporary total disability benefits (TPD/TTD);

(b) permanent partial impairment (PPI);
(c) disability in excess of impairment (PPD);
(d) medical care; and
(e) attorney fees;

3. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate;

4. Whether Claimant's benefits should be barred by application of Idaho Code § 72-403; and

5. Whether the Industrial Commission should retain jurisdiction beyond the statute of limitations.

The Notice of Hearing included an issue of occupational disease. However, as Claimant brings this matter solely under an accident and injury theory, that issue is considered withdrawn. Claimant expressly withdrew the questions of medical care benefits and retention of jurisdiction in her posthearing brief.

CONTENTIONS OF THE PARTIES

Claimant contends she suffered bilateral carpal tunnel syndrome ("CTS") as a result of an accident while she was carrying a case of frozen potato product at work on April 26, 2001. She required surgery on her right wrist and two surgeries on her left. She has suffered permanent impairment and disability totaling 53% of the whole person, and suffers continuing pain in her left wrist and hand. Defendants should pay attorney fees for acting unreasonably.

Defendants contend Claimant's "accident" is suspect. Regardless, her bilateral CTS resolved after surgery, as evidenced by electrodiagnostic studies. Her continuing complaints are not related to a work accident. Apportionment is appropriate for documented prior CTS complaints and because of a nonindustrial fall she suffered shortly after her second left wrist surgery. She has suffered no impairment – and therefore no permanent disability – from this accident. Alternately, she suffered no more than 1% PPI and is entitled to no permanent

disability in addition. She is intentionally underemployed. Defendants' actions were reasonably based upon the opinions of hand surgeon William D. Lenzi, M.D.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant, co-worker Holly Carlson, and ICRD consultant Greg Taylor;

2. Claimant's exhibits 1 – 21;

3. Defendants' exhibits 1 – 8; and

4. Posthearing depositions of vocational analyst Leroy Barton, orthopedic surgeons Fredrick L. Surbaugh, M.D., and William D. Lenzi, M.D.

FINDINGS OF FACT

1. Claimant reported the April 26, 2001, incident on May 1, 2001. While carrying a case of frozen potato products, she lost her grip and hurt her wrists as she tried to control the box.

2. Claimant has worked in restaurants and agriculture and food processing, and as a nurse's aid. She does not have a G.E.D. At the time of the accident she was 39 years old.

Prior Medical Treatment

3. Records of James Irwin, M.D., show no relevant visits between March 1989 and May 1998. Claimant visited several times for various reasons, including occasional reports of pain in her shoulder, chest, or arm, as well as other body parts. In two notes, Dr. Irwin assessed her condition as "fibromyalgia." No hand or wrist complaints were noted, except for an episode of pain in one finger.

4. On September 3, 1998, Dr. Irwin noted a family history of rheumatoid arthritis and recorded, "also has CTS per p[atien]t." His assessment: "I think she is probably getting a

carpal tunnel syndrome on the left, probably related to her job, working as a full time cook. However, the other may well be overuse syndrome or even an insect bite that caused the swelling over the right hand that lasted a day." Follow up one week later showed improvement. CTS was not mentioned by Dr. Irwin again.

5. Dr. Irwin's records from December 1998 through April 2002 do not mention CTS or any wrist or hand complaints.

Medical Care After April 26, 2001

6. Claimant sought chiropractic treatment from Marsha Gehl, D.C., on May 7, 2001. Dr. Gehl's intake form shows Claimant initially denied an accident, but corrected it to show she suffered a work accident. Claimant reported pain had been present for three months and two weeks. Claimant described her condition as, "Carpel [sic] tunnel is getting really bad." After Claimant first described the April 26, 2001, accident to Dr. Gehl, she has described it consistently since. Dr. Gehl treated Claimant's spine despite primary complaints in her forearm, hand, and wrist. Then Dr. Gehl referred Claimant to Fredrick L. Surbaugh, M.D., to evaluate Claimant's wrists.

7. On July 30, 2001, Dr. Surbaugh first treated Claimant. By history, he noted pre-existing mild CTS symptoms which intensified after the April 26, 2001, accident. He examined Claimant and recommended electrodiagnostic studies and probable right wrist surgery. An August 30, 2001, nerve conduction velocity study ("NCV") confirmed median nerve slowing at the wrists.

8. On September 7, 2001, Dr. Surbaugh performed a right carpal tunnel release. He encountered "minimal adhesions." He also noted "positive nerve conduction studies in 1995" and diagnosed CTS with "myofascial pain syndrome referral pain into the hand." The actual

1995 report is not found in the record.

9. Dr. Surbaugh's notes for September and October show a healing right wrist, during which focus shifted to the "moderate" left CTS.

10. On November 2, 2001, Dr. Surbaugh performed a left carpal tunnel release. He found an "extremely dense transverse carpal ligament." In a later report he stated this was found bilaterally.

11. On November 14, 2001, Dr. Surbaugh noted Claimant's left wrist was recovering faster than her right.

12. On December 13, 2001, Dr. Surbaugh noted Claimant reported having fallen and landed on her left arm three weeks prior. He expressed concern about a possible ulnar contusion neuropathy. He released Claimant to return to work with restrictions. By January 25, 2002, he specified a 50-pound work limit. But on March 12, 2002, Dr. Surbaugh was concerned about a possible polyneuropathy as sometimes seen in diabetics. Claimant's condition was not significantly improving. There is no evidence she has diabetes.

13. An April 1, 2002, NCV showed Claimant's left median motor nerve had a moderately prolonged distal latency. Her left upper extremity was otherwise electrodiagnostically normal in the median and ulnar nerves.

14. On April 25, 2002, Jerry E. Nye, M.D., performed a consultation at Dr. Surbaugh's request. He noted that for a time following a CTS release, an abnormal NCV finding is normal. He concurred with Dr. Surbaugh's suggestion that conservative care was appropriate.

15. However, by May 21, 2002, Claimant's symptoms were so bothersome that a second, more extensive, CTS release was performed on her left wrist. Dr. Surbaugh noted

"fairly dense scarring" and a four millimeter band across the median nerve.

16. On July 3, 2002, Dr. Surbaugh released Claimant to work with her right hand only.

17. On August 8, 2002, Dr. Surbaugh suspected reflex sympathetic dystrophy ("RSD") and requested authorization for a sympathetic block to evaluate her left hand symptoms. On August 16, Clinton L. Dille, M.D., performed the sympathetic block. On September 9, Dr. Surbaugh noted the block did not provide symptom relief and recommended physical therapy. Physical therapy helped some, but not enough. On January 14, 2003, John W. Howar, M.D., examined Claimant at Dr. Surbaugh's request. He opined, "She does not have a typical picture of complex regional pain syndrome."

18. On February 11, 2003, Dr. Surbaugh recommended Claimant change jobs. He opined, "Her condition should be considered permanent." Nevertheless, he continued to treat her.

19. On May 7, 2003, William D. Lenzi, M.D., evaluated Claimant at Defendants' request. He found her symptoms following the first surgery on her left wrist "quite peculiar." On examination he noted inconsistencies in her range of motion, grip strength, and pinch strength. He found no atrophy in her left forearm and hand musculature. He found her subjective reports of pain "anatomically inconsistent." He opined Claimant has tendonitis in her left arm, and no RSD. He opined she was medically stable and suffered no permanent impairment. He opined she could return to work without restriction.

20. On September 2, 2003, Dr. Surbaugh assessed Claimant's permanent impairment. He found PPI "hard to quantify" using the AMA Guides, but opined "on a functional basis" her PPI should be rated "at least" 11% of the whole person.

21. On October 28, 2003, Dr. Lenzi opined Claimant's complaints were secondary to tendonitis. He opined, "In the unlikely event that this is not secondary to her tendonitis, it would fall under the pain guide for 'sensory defect or pain that appears to be subjective in nature.' I feel personally that a 5% impairment of the total sensory defect, which is 2% of the upper extremity or 1% of the whole person would be in order." In deposition, Dr. Lenzi clarified his opinion. He opined Claimant probably suffered no PPI from the accident, and she suffered no PPI from the tendonitis. Only *if* her pain is not from tendonitis would the 1% PPI rating be considered related to the accident. In deposition, Dr. Lenzi opined the lack of relief from the sympathetic block shows Claimant does not have RSD.

22. Another NCV was performed November 20, 2003. It showed "minor slowing" of the left median nerve "consistent with the most minimal" findings of CTS. The test showed a marked improvement since the April 1, 2002, study.

23. On January 5, 2004, Dr. Surbaugh imposed permanent restrictions. On January 7, he reported "paradoxical" findings on examination.

24. On March 11, 2004, D. Dean Mayes performed a functional capacities evaluation ("FCE") of Claimant. It was essentially consistent with Dr. Surbaugh's restrictions.

25. On April 9, 2004, Leroy H. Barton, III, performed a disability analysis. Using the FCE and Dr. Surbaugh's restrictions, he opined Claimant suffered a 53% loss of job market access as a result of her medical and nonmedical factors.

26. In posthearing deposition, Dr. Surbaugh opined Claimant's description of the accident is consistent with bilateral CTS arising from chronic low grade tendonitis initiated by repetitive hand motions at work. He opined the accident caused injury to both wrists and possibly her neck, but acknowledged that a work injury is rarely the only cause of CTS.

He opined claimant probably had CTS in her left wrist when she saw Dr. Irwin in 1998. He opined apportionment of causation was inappropriate because her condition was not significantly symptomatic before the accident. CTS symptoms may wax and wane or abate entirely for a period of time. He opined Claimant's left median nerve has not recovered to medical stability yet. He opined that although her fall in November 2002 "certainly could" have impacted her surgical recovery, it would be impossible to tell whether the scarring he noted during the second surgery was caused by the first surgery or by the fall. He opined it probably was caused by the first surgery.

27. In the early Summer of 2003, after a job search assisted by ICRD consultant Greg Taylor, Claimant began working part-time as a maid at the Weston Inn in Twin Falls.

Discussion and Further Findings

28. **Causation**. A claimant bears the burden of proving her condition was caused by a compensable accident to be eligible for workers' compensation benefits. Cole v. Stokely Van Camp, 118 Idaho 173, 795 P.2d 872 (1990). Proof of causation requires medical evidence. Paulson v. Idaho Forest Indus., Inc., 99 Idaho 896, 591 P.2d 143 (1979). Proof to a reasonable degree of medical probability is the required standard. Bowman v. Twin Falls Const. Co., Inc., 99 Idaho 312, 518 P.2d 770 (1978). Specific words by the physician are unnecessary. Jensen v. City of Pocatello, 135 Idaho 406 , 18 P.3d 211 (2000); Paulson, *supra.*

29. Here, Claimant reported to Employer what happened before she saw Dr. Gehl. Given the broad statutory definition of "accident," Idaho Code § 72-102(17)(b), as interpreted by Wynn v. J.R. Simplot Co., 105 Idaho 102, 666 P.2d 629 (1983), it is not surprising that Claimant did not consider the event an "accident" initially. Claimant established she suffered an accident on April 26, 2001. Dr. Surbaugh established the accident caused the bilateral CTS injury and

symptoms through her recovery after the second surgery on her left wrist.

30. **Apportionment.** Dr. Irwin's notes in September 1998, an alleged 1995 study, and Claimant's reports of historical symptoms do not combine to establish a basis for apportionment. The records show Claimant sought medical treatment for conditions both major and minor. Two visits – one week apart – over two years prior to the accident without further medical care, do not show Claimant was significantly symptomatic. Claimant's overall testimony shows her assertions of "CTS" were based upon the advice of friends not shown to have any medical background. Moreover, there has been no suggestion by any physician that her temporary disability or her medical care should be apportioned to any pre-existing cause. Similarly, the record shows Defendants' assertions which attempt to link her condition to the November 2001 fall do not rise above the level of speculation.

31. Claimant's continuing symptoms have been described as "peculiar" and "paradoxical." The pain crosses nerve distributions in a nonanatomical manner. She shows no unexpected electrodiagnostic evidence of a continuing problem. She has no atrophy. Dr. Surbaugh's opinions are entitled to weight as her treating physician. However, his opinions linking her continuing complaints to possible RSD are not well supported by examination findings or the sympathetic block. Drs. Howar and Lenzi opined Claimant does not have RSD. Dr. Lenzi's opinions are also entitled to weight. They are consistent with the medical history, his examinations, and the electrodiagnostic studies.

32. The weight of medical evidence does not support a finding that the continuing pain she reports was caused by the accident and injury.

33. **Malingering/Idaho Code § 72-403.** The findings relating to causation do not in any way suggest that Claimant is malingering. To the contrary, she showed she works hard

because she must. She searched for a job and found one. Moreover, Claimant should not be penalized for reasonably relying upon the restrictions imposed by her treating physician, even if those restrictions are not ultimately relied upon by the Industrial Commission in assessing eligibility for benefits. Defendants failed to show benefits should be barred by application of Idaho Code § 72-403.

34. **Temporary disability.** Claimant is eligible for temporary disability benefits while in a period of recovery. Idaho Code § 72-408. Here, Dr. Surbaugh's correspondence stating "her condition should be considered permanent" may be sufficient to date medical stability as of February 11, 2003. However, Dr. Surbaugh's deposition testimony indicates he believes she is not yet fully recovered. By contrast, Dr. Lenzi's opinion that Claimant was medically stable when he examined her on May 7, 2003, is unequivocal and well supported by his examination and other findings.

35. **Permanent impairment.** Idaho Workers' Compensation statutes define permanent impairment. Idaho Code §§ 72-422 and 424. Impairment is ultimately a question for the Industrial Commission. Urry v. Walker & Fox Masonry, 115 Idaho 750, 769 P.2d 1122 (1989).

36. Here, Dr. Surbaugh's PPI rating is admittedly not derived from the AMA Guides. While that in itself is not preclusive, he clearly considered factors that Dr. Lenzi described as specifically excludable under the AMA Guides. Drs. Howar and Lenzi opined she does not suffer RSD. Because the weight of medical evidence does not show her continuing symptoms causally linked to the accident and injury, and because the carpal tunnel release surgeries do not result in PPI of themselves, Claimant failed to show she was entitled to any PPI as a result of the accident.

37. **Permanent disability.** Idaho Workers' Compensation statutes define permanent disability. Idaho Code §§ 72-423, 425, and 430. The burden to prove a likely permanent disability rests with Claimant. Seese v. Ideal of Idaho, Inc., 100 Idaho 32, 714 P.2d 1 (1985). It is well settled in our case law that without new permanent impairment, no new permanent disability can be awarded. *See,* Eacret v. Clearwater Forest Industries, 136 Idaho 733, 40 P.3d 91 (2002). Claimant failed to show she was entitled to permanent disability benefits.

38. **Attorney fees.** Attorney fees are awardable when the conditions of Idaho Code § 72-804 have been shown. Here, Defendants acted reasonably. They accepted the claim and paid benefits until Dr. Lenzi's report showed her symptoms were no longer related to the accident. Claimant failed to show she is entitled to an award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant suffered an accident and injury on April 26, 2001.

2. Claimant is entitled to medical care and temporary disability benefits through May 7, 2003, without apportionment.

3. Claimant failed to show her continuing symptoms thereafter are related to the accident.

4. Claimant failed to show she is entitled to permanent impairment or disability benefits.

5. Claimant failed to show she is entitled to an award of attorney fees.

6. Defendants failed to show Claimant's eligibility for benefits should be barred by application of Idaho Code § 72-403.

RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED in Boise, Idaho, on this 15TH day of October, 2004.

INDUSTRIAL COMMISSION

/S/_____
Douglas A. Donohue, Referee

ATTEST:

/S/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 22ND day of OCTOBER, 2004, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

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